MILITARY COMMISSION

UNITED STATES OF AMERICA v. IBRAHIM AHMED MAHMOUD AL QOSI a/k/a ABU KHOBAIB al SUDANI	**D-018** **Government Response to Defense Motion to Dismiss Charges for Lack of Jurisdiction (Bill of Attainder)** **9 January 2009**

1. **Timeliness:** This response is timely.

2. **Relief Requested:** The Government respectfully requests the Military Commission deny the Defense Motion to Dismiss all charges for violation of the Bill of Attainder Clause.

3. **Overview:**

a. The Supreme Court has made clear that an alien enemy combatant held outside the sovereign borders of the United States who has no connection to the United States other than his confinement possesses no rights under the Constitution. In light of this principle, the accused cannot reasonably claim any constitutional protections, including with respect to the Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3. The Supreme Court, in the decision *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) did not hold that the U.S. Constitution was applicable law for military commissions. The decision in *Boumediene* was narrowly tailored to specific facts regarding the right to habeas corpus and is silent as to bill of attainder. The Supreme Court did not rule that the U.S. Constitution, *in toto,* was applicable to unlawful enemy combatants.

b. Under the Supreme Court's opinion in *Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950) the constitutional limitations on bills of attainder do not apply *vis-à-vis* these accused — an "alien[] without property or presence within the United States," *id.* at 992-93 — and they are not entitled to the protections of the Bill of Attainder Clause. Moreover, even if the Bill of Attainder Clause were generally to apply to these accused, nothing in the MCA would even approach a violation of it. The MCA provides robust trial procedures that protect the rights of unlawful enemy combatants to a degree unprecedented in the history of warfare, and any punishment under it would be imposed only *after* a full and fair trial. The MCA is therefore not "a legislative act which inflicts punishment without a judicial trial," *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866), and accordingly is not an unconstitutional bill of attainder.

4. **Burden of Persuasion:** In a motion to dismiss for lack of jurisdiction, the burden of persuasion shall be upon the prosecution. R.M.C. 905(c)(1), 905(c)(2)(B).

5. **Facts:** This is a legal motion only and no facts are necessary to its resolution.

6. **Argument:**

a. Under the Supreme Court's opinion in *Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950) the constitutional limitations on bills of attainder do not apply to the accused, an alien outside the sovereign borders of the United States.

Although the Constitution provides that "[n]o Bill of Attainder . . . shall be passed," U.S. Const. art. I, § 9, cl. 3, it does not ensure the legal rights of alien enemy combatants detained in foreign territory. *See Eisentrager*, 339 U.S. at 783-85. *Eisentrager*'s holding that alien enemy combatants detained in foreign territory do not enjoy constitutional protections is not confined to particular clauses of the Constitution, such as the Fifth Amendment. *See* 339 U.S. at 783-85. Rather, *Eisentrager* stands for the broader proposition that the limitations on Congress set forth elsewhere in the Constitution do not apply *vis-à-vis* alien enemy combatants detained outside the United States. Accordingly, the Defense Motion should be denied.

b. Even if the Bill of Attainder Clause does apply *vis-à-vis* the accused, nothing in the MCA violates that clause.

1. The Bill of Attainder Clause prohibits the imposition of "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to *inflict punishment* on them *without a judicial trial.*" *United States v. Lovett*, 328 U.S. 303, 315 (1946) (emphasis added); *see also Cummings*, 71 U.S. (4 Wall.) at 323 ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial").

2. The bill of attainder provision at issue in *Lovett* denied compensation to three Executive Branch employees who were named in the legislation. *See* 328 U.S. at 314 ("What is involved here is a congressional proscription of Lovett, Watson, and Dodd, prohibiting their ever holding a government job."). The forbidden "punishment" in *Lovett* was the denial of Government compensation, and, because the penalty was automatic and did not permit any sort of court review, it was necessarily imposed "without a judicial trial," and therefore in violation of the Bill of Attainder Clause.

3. Similarly, in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), the Supreme Court invalidated a provision of the Missouri constitution that penalized anyone who failed to take a loyalty oath. The following penalty was imposed by Missouri on all those who refused to take the oath:

> Every person who is unable to take this oath is declared incapable of holding, in the State, "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of

> acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation."

Id. at 317. The Supreme Court regarded these "disabilities created by the constitution of Missouri" as "penalties — they constitute punishment." *Id.* at 320; *see also Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (holding that a federal loyalty oath required of attorneys with respect to certain past acts was an unconstitutional bill of attainder). As Justice Frankfurter explained in *Lovett*, "the provisions involved in [*Cummings* and *Garland*] did not condemn or punish specific persons by name, they proscribed all guilty of designated offenses. Refusal to take a prescribed oath operated as an admission of guilt, and automatically resulted in the disqualifying punishment." *Lovett*, 328 U.S. at 327 (Frankfurter, J., concurring). That is a far cry from what has occurred under the MCA.

4. The Defense relies heavily on *United States v Brown,* 381 U.S. 437 (1965) for the proposition that legislation aiming to mitigate a threat posed by a group of people rises to the level of "punishment", and is therefore an unconstitutional bill of attainder. *Brown* invalidated §504 of the Labor-Management Reporting and Disclosure act of 1959, 29 U.S.C §504. By preventing members of the Communist Party from serving as labor union officers, §504 aimed to meet the threat of communist subversion in America's industrial workforce. The Court reasoned that §504 focused too narrowly on a specific group of people—members of the Communist Party—and deprived them of employment, an action traditionally understood as punishment forbidden by the Bill of attainder Clause. *Brown* at 445 (see also *Lovett* at 316; *Cummings* at 320.)

5. The Defense fails, however, to mention that *Brown* is not the Supreme Court's final word regarding the Bill of Attainder Clause. In *Nixon v. Administrator of General Services,* 433 U. S. 425 (1977), the Court rejected the argument, relied upon here by the Defense, "that *Brown* establishes that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." *id* at 471. The Court upheld a statute providing for governmental custody of documents and recordings made during the Nixon administration, and abandoned *Brown*'s reasoning in favor of a rather different formula for deciding bill of attainder cases. *id* at 480. The law specifically applied only to President Nixon and directed an executive agency to control the documents and regulate their public dissemination. The legislation provided for the possibility of compensation to President Nixon in the event of a judicial determination that the seizure of any particular document constituted a taking. The Court ruled that the Bill of Attainder Clause does not prevent Congress from burdening some persons or groups apart from all other plausible individuals or groups. President Nixon was specifically named in the act, but this did not doom the act because he "constituted a legitimate class of one" on whom Congress could "fairly and rationally" focus. *id* at 472. Here, likewise, the MCA specifically names "unlawful enemy combatants", a non-arbitrary and thus legitimate class, upon which Congress can fairly and rationally focus in order to fulfill its responsibility to protect the American people.

6. The Military Commissions Act asserts jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. The term "unlawful enemy combatant" means:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Id. § 948a(1)(A). To the extent the accused is an alien who comes within either of the above classes of persons, he may be tried under the MCA. It is the *result* of that trial that will determine whether he is punished, and, if so, to what degree.

7. However, even if the MCA's classification of "unlawful enemy combatants" was sufficiently specific to bring it within the prohibition of the Bill of Attainder Clause, the question of punishment within the meaning of the clause is unresolved. *Nixon's* analysis of what constitutes punishment under the clause is three- pronged: 1) does the law at issue impose punishment traditionally judged to be prohibited by the clause?; 2) if so, could the law, viewed in terms of the type and severity of burdens imposed, rationally be said to further nonpunitive legislative purposes?; and 3) does the legislative record evince a congressional intent to punish?. *id at* 484. The MCA survives this analysis.

8. The Defense attempts to avoid this conclusion in the first instance by arguing that it is not the result of trial by military commission that constitutes punishment, but infers the trial itself is the punishment. However, this reading of the Bill of Attainder Clause turns Supreme Court precedent on its head. The Government is aware of no case holding that merely trying a defendant before an Article I judge *itself* counts as punishment.

9. Nothing in the Bill of Attainder Clause forbids Congress from prescribing the procedures to be used in military commissions involving a finite class of individuals. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court rejected the system of military commissions created by the President under his inherent authority as commander-in-chief, without prior express authorization from Congress. *See id.* at 2786. Even among the Justices who voted to strike down the pre-MCA military commissions system, virtually all appeared to agree that it would be appropriate for Congress and the President jointly to enact a system of military commissions. *See, e.g., id.* at 2799 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."). Here, Congress and the President have done precisely that, and carefully specified the persons subject to the jurisdiction of the military commissions. These limitations on the jurisdiction of the military commissions, which cabin the jurisdiction of the commissions to unlawful enemy combatants, were required by the plurality in *Hamdan, see id.* at 2776 (plurality op.) (describing the jurisdiction of those military commissions "convened as an 'incident to the conduct of war'" as being "limited to offenses cognizable during

time of war), and necessarily apply to a finite group of persons concerning a finite group of offenses. This group is not, however, exhausted by Guantanamo detainees. It includes any and all unlawful enemy combatants. Accordingly, it does not remotely pose constitutional problems.

10. Nor is the extension of the court's jurisdiction to a finite group of persons a "punishment" that could not be accomplished without a trial; rather, it is the prescription of a *process* by which those persons will be tried. This cannot conceivably conflict with the Bill of Attainder Clause. After all, the purpose of the Clause is to ensure that a penalty is not imposed until after a fair trial has occurred. It would be perverse, and ultimately self-defeating, if the very act of subjecting a person to the trial itself *violates* the Clause. Nothing in the Constitution compels such an absurd result.

11. The Defense's argument that other provisions of the MCA violate the Bill of Attainder Clause is likewise specious. The Defense argues that the MCA violates the clause by (1) "stripping" the accused of his rights under the Geneva Conventions; (2) altering hearsay rules; (3) permitting the admission of coerced statement that are reliable, probative and whose admission would serve the interests of justice; (4) altering the accused's ability to call witnesses; and (5) limiting his ability to bring actions over detention conditions. Each of these various claims is easily refuted:

1) *Geneva Conventions*

The Defense claims the MCA is "a violation of Common Article 3...stripping "alien unlawful enemy combatants of specific procedural rights and evidentiary protections." Mot. to Dismiss (Bill of Attainder) at 5. Common Article 3, requires that the accused be tried before "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See Hamdan*, 126 S. Ct. at 2796. First, the Geneva Conventions do not confer individual rights; rather they create rights and duties for the nation-states that are the high contracting parties to those agreements. Even if the MCA violated Common Article 3, which it does not, the accused here would not have standing to complain that the United States was not living up to its international commitments to the other high contracting parties. Consequently, the MCA cannot punish the accused by depriving them of rights they never possessed. Second, Congress has explicitly, and reasonably, determined that the MCA complies with the United States' obligations under Common Article 3. *See* 10 U.S.C. § 948b(f) ("A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."). That determination is unquestionably correct, as the MCA and RMC afford the accused a panoply of procedural protections that far exceed any granted to an unlawful enemy combatant in the history of warfare. Further, that determination is entitled to substantial judicial deference, being, as it is, the joint judgment of the political branches, to which are committed the authorities to declare and wage war, to define and punish violations of the law of nations, and to conduct the nation's foreign affairs. Accordingly, the MCA easily meets the requirements of Common Article 3, and the accused have therefore not been deprived of his rights thereunder.

2) *Adapting the Military Rules of Evidence to account for military and intelligence realities*

The Defense makes much of the fact that the hearsay and other evidentiary rules in military commissions differ from those in civilian courts or courts-martial. However, the limited differences between court-martial rules and those under the MCA merely reflect military and intelligence realities. Unyielding rules of hearsay and derivative evidence are simply impractical when evidence or statements may be sought that were collected half-a-world away in the midst of a battle, as well as in light of the significant amount of classified information likely to be at issue in military commissions. Moreover, nothing in the Constitution prevents Congress from modifying procedural protections, including those governing the admission of hearsay and allegedly coerced testimony. The Supreme Court has repeatedly upheld Congress's authority to modify procedural and evidentiary trial rules and to make such modifications retroactive. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994) ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity."); *see also id.* at 275 n.26 ("While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case.") (citing cases); *see also Hopt v. Utah*, 110 U.S. 574, 589 (1884) ("Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefore than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.").

The Government also notes that the more liberal evidentiary rules in the MCA (such as the greater admissibility of hearsay) do not necessarily work to the accused's disadvantage, since they may rely on such rules to introduce evidence in their own defense. In that sense, the liberalized hearsay rules under the MCA are closely akin to retroactive procedural changes that the Supreme Court has approved in the past. *See, e.g., Carmell v. Texas*, 529 U.S. 513, 546 (2000) (holding that a statute that retroactively lowered the quantum of evidence required to convict violated the Ex Post Facto Clause, but noting that rules liberalizing the *admissibility* of evidence would not: "The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant.").

3) *Actions to challenge detention*

The defense argues that the habeas stripping provision of the MCA is a bill of attainder violation precluding the accused from challenging their detention by way of a writ of habeas corpus. This argument must fail. Under *Eisentrager*, alien unlawful enemy combatants who have been tried (as the *Eisentrager* petitioners were) or are being tried do not possess constitutional rights. In fact, the Supreme Court in *Boumediene v. Bush*, 128 S. Ct 2229 (2008), distinguished *Eisentrager* partly based on this, holding that the status of the detainees (i.e., the fact that they had not yet been charged) was a significant factor in permitting the habeas writ to

run to Guantanamo. Unlike the *Boumediene*-petitioners, however, who theoretically faced the prospect of a lengthy detention without a trial, the instant accused *are* being tried for their crimes, and thus are far closer to the petitioners in *Eisentrager*, who were found not to possess constitutional rights.

12. Given the offenses with which these accused have been charged, the claim that their trial before this military commission is itself punishment is without merit. In a 142-year-old opinion by the Attorney General, which remains binding on the Executive Branch,to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war. 11 Op. Atty. Gen. 297, 312 (1865).

13. In other words, an unlawful combatant, such as these accused, violates the law of war merely by providing personnel—including themselves—to an organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling . . . of peaceable citizens or soldiers." Winthrop, Military Law and Precedents, 784 (1895, 2d ed. 1920). Colonel Winthrop notes that during the Civil War, numerous individuals were charged—and were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission"—based upon their material support for groups of unlawful combatants. *Id.* (emphasis added). *See also* 11 Op. Atty. Gen. at 314 ("A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war"). Here, the accused are not being shot on sight or anything of the sort. They are being humanely detained and will be tried before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Nothing more is required.

14. The MCA and MMC provide more process than has ever been guaranteed to enemy combatants in any war ever fought, and cannot possibly be described as "a legislative act which inflicts punishment without a judicial trial." *Cummings*, 71 U.S. (4 Wall.) at 323. Because any punishment that is imposed on the accused will only take effect after a judicial trial containing an unprecedented panoply of procedural protections, including the opportunity for judicial review before an Article III tribunal, the MCA can in no way be considered a bill of attainder.

15. As the foregoing demonstrates, the MCA enacts no "punishment" traditionally prohibited by the Bill of Attainder Clause. Therefore, consideration of *Nixon'* s second prong-whether the act prescribes impermissible punishment- is moot. Assuming the alternative, *arguendo,* the MCA's purposes are manifold and are in no way limited to prescribing punishment. The MCA dictates no outcomes. Again, it sets up a process for adjudication of charges brought against unlawful enemy combatants. Indeed, the MCA's ultimate purpose- to enhance the security of the American people- is rational and, in the considered view of Congress and the President, necessary.

16. *Nixon's* third prong is legislative history. Contrary to assertions from the Defense, the MCA's legislative record does not evince an intent to punish via the MCA. Cherry-picked sections from several Congressional floor speeches and convenient recitation of recent events neither establish nor exhaust the MCA's legislative history. Moreover, to credit the Defense's contention that by enacting the MCA Congress intended to "punish" unlawful enemy combatants, one must regard as a burden the fact that the MCA provides a process whereby the accused benefits from the following: the assistance of defense counsel, *see* RMC 502(d)(6), 506; discovery, including exculpatory evidence or an adequate substitute if such evidence is classified, *see* RMC 701; the ability to take depositions, *see* RMC 702; the opportunity to call witnesses, *see* RMC 703; and many other privileges that are carefully described in the Rules for Military Commissions and the MCA.

17. In addition, the accused will have his case heard before an impartial judge, *see* RMC 902, and will be able to challenge the impartiality of the members who will decide his guilt, *see* RMC 902. Should the accused be convicted, the convening authority will be authorized to set aside a finding of guilty or to reduce the severity of the offense or punishment; the convening authority may *never* increase the severity of the offense or punishment. *See* RMC 1107. If the accused is convicted, he may have his case reviewed by the Court of Military Commission Review. *See* RMC 1201. Beyond that, the Rules for Military Commissions provide that the accused may petition for his case to be reviewed by the U.S. Court of Appeals for the D.C. Circuit, and even by the U.S. Supreme Court. *See* RMC 1205. Nothing in *Nixon* or previous cases dealing with the Bill of Attainder Clause justifies such a tortured interpretation. Accordingly, the Defense Motion should be denied.

6. **Conclusion:** Under binding precedent, the constitutional limitations on bills of attainder do not apply to enemy alien combatants outside the country, such as the accused. Even if they did apply, however, nothing in the MCA approaches a violation of the Bill of Attainder Clause. The motion to dismiss should be denied.

7. **Oral Argument:** This Commission should readily deny the Defense's motion, but the Government will be prepared to argue this motion if this Commission deems it necessary.

8. **Witnesses and Evidence**: All of the evidence and testimony necessary to deny this motion is already in the record.

9. **Certificate of Conference:** As stated by the Defense.

10. **Additional Information:** None.

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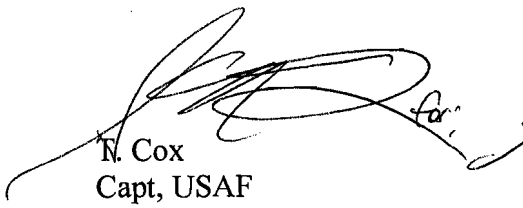

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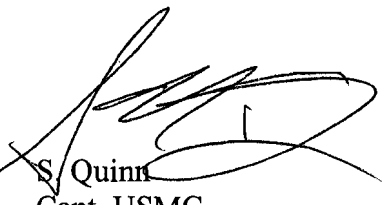

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